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IN THE

Supreme Court of The United States

October Term 1954

No. 453

Blanchard F. Robique
Theodore Kapsos,
Petitioners

vs.

George A. Lambert,
U. S. Director of Internal Revenue
For the State of Louisiana, etc.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Blanchard F. Robique and Theodore Kapsos, petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on June 4, 1954, rehearing denied July 22, 1954.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court printed in Appendix A hereto, infra, p. ii, is reported in 114 Fed. Supp. 305. The opinion of the Circuit Court of Appeals, printed in Appendix A hereto, infra, p. vii, is reported in 214 F. 2d. 3.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 4, 1954, page vii, infra. Rehearing was denied on July 22, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

QUESTION PRESENTED

The questions presented are several and alternative:

1. Is I.R.C. 3653 (26 U.S.C. 3653) an absolute bar to the issuance of an injunction against the imposition of a tax by the United States Internal Revenue Department, or are there exceptions to same?

2. If there are exceptions, can a complaint alleging what are considered to be exceptions to I.R.C. 3653, be dismissed on a motion for want of jurisdiction without a hearing on the merits of the complaint?

3. If I.R.C. 3653 admits of no exceptions, is it unconstitutional as being restrictive of Article 3, Section 2 United States Constitution?

The exceptions hereinabove referred to are those that petitioners allege have been read into this statute by the jurisprudence and not those specifically set out in said statute, namely I.R.C. Sections 272 (a), 871 (a) and 1012 (a) (26 U.S.C. Sections 272 (a), 871 (a), 1012 (a)).

STATUTE INVOLVED

The statutory provision involved is Section 3653 of the Internal Revenue Code, 52 Stat. 446, 26 U.S.C. Section 3653. It provides as follows:

> "SEC. 3653. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.
>
> (a) Tax.-Except as provided in sections 272 (a), 871 (a) and 1012 (a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

STATEMENT

Petitioners herein are the owners of two small bars and restaurants, such as dot the countryside of America and are ever present in vast numbers in every nook and cranny, urban and rural, throughout this great land. These bars and restaurants are situated in or around the small Louisiana community of New Iberia. On their premises, entirely in accordance with law, they operated several pinball machines, such as are operated by the little shop just at the corner from everybody's house, for the amusement of its customers and to help defray the overhead, and such as have been operated in one form or another since time immemorable.

In 1941 (55 Statute 722) Congress imposed a tax on coin-operated amusement and gaming devices which became Section 3267 of the Internal Revenue Code (26 U.S.C. 3267) and which imposed a tax of ten dollars ($10.00) per year

on "any amusement or music machine operated by means of the insertion of a coin, token or similar object" and a tax of fifty dollars ($50.00) per year on "so-called 'slot' machines which operate by means of the insertion of a coin, token or similar object and which by application of the element of chance may deliver or entitle the person playing or operating the machine to receive, cash, premium, merchandise or tokens."

Through the ensuing years, by virtue of amendments in 1942, 1950 and 1951, the aforementioned $50.00 tax was gradually increased to the point where it is today Two hundred fifty ($250.00) dollars per year.

In furtherance of this special stamp tax and to provide the medium to apply for same, the United States Treasury Department, Internal Revenue Service, promulgated Form 11-B which up until as recently as the revision date of October 1949, specifically classified pinball machines under the category of a coin-operated amusement device calling for a tax of $10.00 each. Also as recently as November 14, 1951, the Bureau of Internal Revenue had ruled that "unless pinball game is especially rigged to be gambling device it it subject only to amusement machine tax even though it may be used for gambling."

Your petitioners, as well as the many other thousands of operators of pinball machines in the State of Louisiana and within the tax district of the defendant herein, with the assistance and guidance of agents of the defendant, had always applied for $10.00 stamps since the first enactment of the aforesaid special tax.

In June, 1952, your petitioners following the procedure that had then been followed for over ten years, applied for and obtained Ten Dollar tax stamps as they had always done. On or about October 1st, 1952, the defendant through his agents, informed your petitioners that it would be necessary for them to apply for $250.00 tax stamps for the same machines for which they had been issued $10.00 stamps and by a series of acts which your petitioners have complained of and alleged to be coercive, fraudulent, penal, punitive, illegal and arbitrary sought to coerce your petitioners to accede to their demand for the $250.00 stamp. When your petitioners rebelled, they were assessed for principal, penalty and interest and liens filed against them. This whole matter culminated in January, 1953, when your petitioners filed injunction suits against the Director of the Louisiana Division of the United States Treasury Department, Internal Revenue Service and his agents, which suits are the subject of this application.

In their complaints your petitioners set forth in particularity the following grounds for the issuance of the injunction prayed for.

1. That the enforcement of the assessment would lead to a multiplicity of suits.

2. That the assessment would produce irreparable injury.

3. That the assessment on its fact was valid but that extrinsic evidence could be produced to show its invalidity.

4. That there was an allegation of fraud in the assessment.

5. That the assessment was a penalty.

6. That the tax was unconstitutional.

In February, 1953, the defendant filed a motion to dismiss for want of jurisdiction in the District Court because of the prohibitory provisions of Section 3653 of the Internal Revenue Code (26 U.S.C. Section 3653).

In May, 1953, the motions to dismiss were submitted and the court sustained same, dismissing your petitioners' complaints without a hearing to determine if your petitioners' complaint fell within the exceptions to I.R.C. 3653 (26 U.S.C. Section 3653) as read into the jurisprudence by many decisions of this Court.

An appeal was taken to the United States Court of Appeals for the Fifth Circuit, who sustained the judgment of the District Court on June 4, 1954, and rendered an order denying a rehearing on July 22, 1954.

REASONS FOR GRANTING THE WRIT

1. The decisions of the courts below in dismissing petitioners complaints without a hearing for want of jurisdiction because of I.R.C. 3653 (26 U.S.C.A. 3653) is clearly in error. The reluctance of the courts to restrain or interfere with the collection of taxes has long been the attitude of the courts. This attitude was prevalent long before the enactment of R.S. 3224, 14 Stat. 475, which is the derivation

of I.R.C. 3653. A good review of that jurisprudence may be found in *Pullan v. Kinsinger*, C.C. Ohio, 1870, 2 Abb. 94, 20 Fed. Cas. No. 11, 463, the case on which the government depends for its argument that I.R.C. 3653 is constitutional about which case something will be said hereafter.

But never have the courts held this rule to be absolute. To the contrary, it has always allowed exceptions.

In the early case of *Dow v. City of Chicago*, 11 Wall 108, 20 L. Ed. 65, the Court quoting *Heywood v. Buffalo*, 14 N.Y. 534, said that the general rule that "a court of equity will not entertain an action by the party aggrieved for relief against erroneous or illegal assessment" but the court went on to say that "this rule was subject to three exceptions," viz.,

1. Where the enforcement of the assessment would lead to a multiplicity of suits, or,

2. Where the assessment would produce irreparable injury, or,

3. Where the assessment on the face of the proceedings was valid, and extrinsic evidence would be required to show its invalidity.

The case of *Hannewinkle v. Georgetown*, 15 Wall, 247, 21 L. Ed. 231, added a fourth exception, i.e., where there is an allegation of fraud.

This principal was cited with approval in *State Railroad*

Tax Cases, 92 U.S. 575, 23 L. Ed. 673; *Union Pacific Railway Co. v. Cheyenne*, 113 U.S. 516, 28 L. Ed. 1099; *Milwaukee v. Koeffler*, 116 U.S. 219, 29 L. Ed. 612; *Shelton v. Platt*, 139 U.S. 591, 35 L. Ed. 273; *Ogden City v. Armstrong*, 168 U.S. 244, 42 L. Ed. 444; *Wilson v. Lambert*, 168 U.S. 611, 42 L. Ed. 599; *Pittsburgh C.C. and St. L.R. Co. v. Board of Public Works*, 172 U.S. 32, 43 L. Ed. 354.

See also *Pacific Steam Whaling Co. v. U.S.*; 187 U.S. 447, L. Ed. 253; *Dodge v. Osborn*, 240 U.S. 118, 60 L. Ed. 557; *Bailey v. George*, 259 U.S. 16, 66 L. Ed. 816 and *Hill v. Wallace*, 259 U.S. 44, 66 L. Ed. 822.

A recent group of cases added to more exceptions to the foregoing general rule which are:

1. That it does not apply when the alleged tax is a penalty and

2. That it does not apply when the tax is unconstitutional.

These cases are *Lipke v. Lederer*, 259 U.S. 557, 66 L. Ed. 1061, *Regal Drug Corp. v. Wardell*, 260 U.S. 386, 67 L. Ed. 319; *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 76 L. Ed. 422; *Rickert Rice Mills, Inc. v. Fontenot*, 297 U.S. 110, 80 L. Ed. 513.

So that reviewing the foregoing cases leads to the inevitable conclusion that an error is made when it is thought that I.R.C. 3653 clothes the U.S. Treasury Department with a cloak of immunity from the process of equitable jurisdic-

tion afforded for the relief of the aggrieved, as was done when the lower court dismissed petitioners' complaints.

2. There is no doubt but that there are exceptions to I.R.C. 3653 (beyond those specifically recited therein). The decisions of this Honorable Court have said so.

If there are exceptions, can a complaint be summarily dismissed without inquiry into the merits of the complaint when the complaint makes out a prima facie case of relief?

In their complaints, your petitioners have recited facts which they allege condemn the Internal Revenue Service to a course of conduct entitling them to equitable relief. And, if your petitioners had been able to prove these facts, and had been denied the relief prayed for, this case would be before your Honors on its merits rather than this preliminary procedural question. If your petitioners had not been able to prove these facts, then their case would have fallen for want of proof. But as it stands, petitioners did not even get the chance to offer their proof.

The results reached by the decisions of the lower courts in this case is tantamount to a judge deciding on the merits of the case without ever having heard any evidence. This is a dangerous result reaching into many aspects of life and affecting a vast number of people. As far as taxes are concerned it is tantamount to relegating every taxpayer, regardless of what he complains of, to the long ineffectual route which might mean his economic death before he reaches his relieving destination.

Our Government has not become so lustful for money that its courts are no longer willing to hear the plaintiff cry of an oppressed citizenry.

Not even in the formative but darker ages in our juridical development was this true.

3. The position assumed by the lower court in this case is that of saying that I.R.C. 3653, an enactment of Congress, has had its desired effect and thereby withdrawn from the courts of the United States their jurisdiction over equity actions when they concern taxes.

Article III, Section 2, of the U. S. Constitution provides:

> "The judicial Power shall extend to all cases in law and equity arising under this Constitution, the Laws of the United States and Treaties made . . ."

There are only two cases in which the constitutionality of I.R.C. 3653 was challenged. The earliest of these is *Pullan v. Kinsinger* 2 Abb. 94, 20 Fed. Cas. No. 11463, which is the case relied on by the government for the constitutionality of I.R.C. 3653.

This case arose on the question of the constitutionality of R.S. 3224 from which I.R.C. 3653 was derived. The court concluded that R.S. 3224 was only a legislative enactment of the existing law and therefore constitutional.

But even in that case the court said:

> "To avoid misconstruction upon so grave a subject, we think proper to state, we do not consider that congress can withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at common law or in equity or admiralty . . . "

Remembering that our federal government is one of constitutional authority wherein there is a jealously regarded division of powers between departments, petitioners urge that Congress cannot take the jurisdiction over tax matters from the U.S. Courts any more than they could take the jurisdiction over other equitable controversies.

Petitioners further urge that this is especially true if the congressional enactment is held to be an absolute bar.

Of course, one cannot prescind from the idea that if the legislation is initially unconstitutional, judicial opinions cannot change this nature.

The other case wherein the constitutionality of I.R.C. 3653 became an issue was *Steinhagen Rice Milling Co. v. Scofield*, 87 F. 2nd. 804, certiorari denied, 57 S. Ct. 494, 300 U.S. 663, 81 L. Ed. 872. Therein the Circuit Court of Appeals had only one sentence to say on R.S. 3224 which might relate to its constitutionality:

> "Citation of authorities is unnecessary to show the section is valid."

Petitioners urge that these two cases hardly constitute such *stare decisis* as would forego this Court's inquiry into a matter so important as the constitutional challenge.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

_____

G. Wray Gill

_____

Gerard H. Schreiber

Attorneys for Petitioners

November _____, 1954.

CERTIFICATE

I certify that copies of the foregoing brief have been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto.

_____

APPENDIX A

JUDGMENT

MINUTE ENTRY May 11, 1953 Christenberry, J.

(Titles and Numbers Omitted)

This cause came on to be heard on defendant's motion to dismiss for want of jurisdiction, and was submitted by respective counsel on written briefs, when the Court took time to consider.

Now, on due consideration thereof, and for reasons of the Court to be hereafter filed of record in this cause, it is

ORDERED that the motion of defendant to dismiss the complaint be, and the same is, hereby GRANTED, and that the complaint be, and it is hereby, DISMISSED.

(s) H.W.C.

REASONS FOR JUDGMENT

(Numbers and Titles Omitted)

Filed: July 9, 1953

CHRISTENBERRY, J.

By these suits complainants seek to restrain and enjoin the United States Director of Internal Revenue of the State of Louisiana, and his subordinates, from levying and collecting, under the provisions of Section 3267 of the Internal Revenue Code, a special tax of $250.00 per year on each of certain coin operated pinball machines, located in bar-restaurants owned and operated by complainants.

Complainants allege that they have paid a special tax of $10.00 per year on each such machine, this being the tax fixed by the Statute for coin operated amusement devices, but notwithstanding that they have paid the special tax of $10.00 per year, respondent, through his subordinates, has demanded that complainants pay a tax of $250.00, per year, per machine, which is the tax levied by the Statute on slot machines and has threatened to issue warrants of distraint to effect collection of the tax.

Complainants allege further that the demand for the higher tax is based upon an enlargement by respondent of the definition of the term slot machine as contained in the Statute by adding thereto the words "and other gaming device."

They contend that the assessment of the higher tax, and demand for payment thereof under threat of seizure is punitive, arbitrary, capricious and discriminatory, and in violation of the Due Process Clause of the United States Constitution. They allege want of an adequate remedy at law, and irreparable injury, and pray for injunctive relief.

Respondent has moved to dismiss the complaints on the ground that because of the provisions of Section 3653, Internal Revenue Code (26 U.S.C.A. § 3653), this Court is without jurisdiction.

The motions to dismiss were submitted by respective counsel, for decision, on briefs, and on May 11, 1953, after due consideration, it seeming clear to the Court that they were well-founded, the motions to dismiss were granted and orders entered dismissing the suits, with the statement that written reasons would be subsequently filed.

The pertinent portion of Section 3653, Internal Revenue Code (26 U.S.C.A. § 3653), reads as follows:

> "(a). Tax. Except as provided in Section 272(a), 871(a) and 1012(a), no suits for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

These suits do not fall within the provisions of any of the excepted Sections. All of such Sections have to do with petitions to the Tax Court of the United States.

Long before the adoption of Revised Statute 3224 from which Section 3653(a) Revenue Code is derived, courts of equity declined to entertain suits for relief against the erroneous or illegal assessment and collection of taxes. Revised Statute 3224 merely crystallized that rule into positive law.

Complainants recognize the general rule laid down by Section 3653, but say that it is not a hard and fast one, and that in exceptional circumstances the courts may take jurisdiction and grant such relief as is here sought. Briefly, the exceptional circumstances alleged to exist here are that complainants are unable to pay the tax demanded, and that the action of respondent will give rise to a multiplicity of suits in that complainants will be required to file several suits to obtain refund of such taxes as may unlawfully be collected from them.

Although complainants plead their inability to pay the tax it is plain from the pleadings that what they mean is that payment of the tax will be a hardship.

Assuming arguendo only that as urged by the complainants exceptional circumstances constituting equities sufficient to sustain jurisdiction may in some cases be shown to exist, it is clear that the pleadings in the instant cases do not present such circumstances. Allegations of hardship to pay taxes are not sufficient to confer jurisdiction on this Court. *State of California v. Lattimer*, 305 U.S. 255, 262, 59 S. Ct. 166. *Reams v. Vrooman-Fehn Printing Co.*, 140 F. 2d, 237.

Complainants' contention that failure to obtain injunctive relief will result in a multiplicity of suits, and that this is a special circumstance which will bring these cases within the exception to the rule, is also without merit. Several suits can hardly be called a multiplicity. As used in this connection the term means a great number. There is no reason to believe that numerous suits will be necessary to determine the question of the tax properly due on the machines in question. A single suit by each complainant is all that will be required.

Contrary to complainants' contentions they are without adequate remedy at law; the Government has provided what the Court in State Railroad Tax Cases, 92 U. S. 575, 613, 614, described as a complete system of corrective justice in regard to all taxes imposed by the general government, which in both branches is founded upon the idea of appeals within the executive departments.

And in deciding those cases, the Court said further:

> "If the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid, by suit against the collecting officer. But there is no place in this system for application to a court of justice until after the money is paid."

Simply put, the objective of the complainants is to thwart the collection of taxes by the United States, while at the same time continuing to operate the devices on which the taxes are levied. This is unquestionably a result which

Section 3653 Internal Revenue Code (26 U.S.C.A. Section 3653) is intended to prevent.

The remedy of the complainants is to pay the taxes, apply for refund, and if refund is denied, sue the Director to recover the taxes. *Larson, Collector of Internal Revenue v. House*, et al, 112 F. 2d, 930, 5 C.C.A. (1940).

This Court is without jurisdiction in these cases.

New Orleans, Louisiana, July 9th, 1953.

(s) Herbert W. Christenberry
UNITED STATES DISTRICT JUDGE.

OPINION OF THE COURT FILED: JUNE 4, 1954.

Before HUTCHESON, Chief Judge, and HOLMES and BORAH, Circuit Judges.

PER CURIAM: This is an appeal from a judgment entered under Section 3653, 26 U.S.C.A., in the consolidated causes dismissing for want of jurisdiction suits appellants had brought to restrain the appellee from levying and collecting a special tax of $250.00 on coin operated pin ball machines.

Appellant is here urging upon us: (1) that within the teachings of *Miller v. Nut Margarine Co.*, 284 U.S. 498, this case presents an exception to the operation of the statute; and (2) that the statute is unconstitutional.

We think it clear that neither of these positions is well taken.

The district judge, in a carefully considered opinion,[1] has set out the issues joined and the reasons supporting the judgment. Because we find ourselves in full agreement not only with the result reached but with the reasons given by him, we will content ourselves with saying so and will not further labor the matter.

The judgment is right. It is AFFIRMED.

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[1] *Robique v. Lambert, Kapeos v. Lambert*, 114 Fed. Supp. 305.

BRIEF

FOR THE

RESPONDENTS

IN

OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 453

BLANCHARD F. ROBIQUE, THEODORE KAPSOS,
PETITIONERS

v.

GEORGE A. LAMBERT, U. S. DIRECTOR OF INTERNAL REVENUE, FOR THE STATE OF LOUISIANA, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. vii) is reported at 214 F. 2d 3. The opinion of the district court (Pet. App. ii-vi) is reported at 114 F. Supp. 305.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1954 (Pet. App. vii). A petition for rehearing was denied on July 22, 1954. On October 20, 1954, by order of Mr. Justice Black, the time within which to file a petition for a writ of certiorari was extended to November 20, 1954. The petition for a writ of certiorari was filed on November 18, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 3653 of the Internal Revenue Code, which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," prohibits the issuance of an injunction barring the collection of stamp taxes on pinball machines on suit by a taxpayer who alleges that the tax is illegal and discriminatory and that he is unable to pay it.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

SEC. 3267 [As added by Sec. 555, Revenue Act of 1941, c. 412, 55 Stat. 687, and as amended by Sec. 617(b), Revenue Act of 1942, c. 619, 56 Stat. 798, and Sec. 463 of the Revenue Act of 1951, c. 521, 65 Stat. 452]. TAX ON COIN-OPERATED AMUSEMENT AND GAMING DEVICES.

(a) *Rate.*—Every person who maintains for use or permits the use of, on any place or premises occupied by him, a coin-operated amusement or gaming device shall pay a special tax as follows:

(1) $10 per year in the case of a device defined in clause (1) of subsection (b);

(2) $250 per year, in the case of a device defined in clause (2) of subsection (b); and

(3) $10 or $250, as the case may be, for each additional device so maintained or the use of which is so permitted. If one such device is replaced by another, such other

device shall not be considered an additional device.

(b) *Definition.*—As used in this Part, the term "coin-operated amusement and gaming devices" means (1) any amusement or music machine operated by means of the insertion of a coin, token, or similar object, and (2) so-called "slot" machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premium, merchandise, or tokens. The term does not include bona fide vending machines in which are not incorporated gaming or amusement features. * * *

* * * * *

(26 U.S.C. 1952 ed., Sec. 3267.)

SEC. 3653. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax.*—Except as provided in sections 272(a), 871(a) and 1012(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

* * * * *

(26 U.S.C. 1952 ed., Sec. 3653.)

Treasury Regulations 59, promulgated under the Internal Revenue Code:

SEC. 323.22 [As amended by T.D. 5203, 1942-2 Cum. Bull. 276]. *Rates and Computation of Tax.*—Special taxes are imposed as follows:

* * * * *

Examples of machines which, when operated by means of the insertion of a coin, token, or similar object, are regarded as gaming devices for purposes of these regulations are:

(a) A "pin-ball" machine with respect to which unused "free plays" are redeemed in cash, tokens, or merchandise, or with respect to which prizes are offered to any person for the attainment of designated scores.

(b) A machine which, even though it does not dispense cash or tokens, has incorporated gaming features in the form of combinations of insignia on reels or drums.

STATEMENT

These two actions, which were consolidated on motion of the taxpayers concerned (R. 27), were brought to restrain collection of the tax imposed upon gaming devices by Section 3267 of the Internal Revenue Code of 1939. The gist of both complaints (R. 2-13, 14-26), which are substantially identical, is that the Director of Internal Revenue determined that certain so-called pinball machines upon the premises of each taxpayer were operated as gambling devices, and therefore were subject to the tax of $250 per year imposed on slot

machines by Section 3267(a)(2) of the Internal Revenue Code, and has threatened to issue warrants of distraint to effect collection of the tax. *Inter alia,* the complaints allege (R. 9-11, 22-23) that the determination of the Director is punative, arbitrary, and discriminatory; that the taxpayers have no adequate remedy at law; that taxpayers are unable to pay the tax; and that unless the collection of the tax is enjoined taxpayers will suffer irreparable injury. Taxpayers further allege that the action of the Director will give rise to a multiplicity of suits inasmuch as the taxpayers concerned will each have to file several suits to recover such taxes as may unlawfully be collected from them, and that the Director is arbitrarily subjecting them to civil and criminal penalties without due process of law.

The Director filed motions to dismiss (R. 28) upon the ground that the district court was without jurisdiction because of the prohibition upon suits to enjoin the collection of any tax provided by Section 3653(a) of the Internal Revenue Code, which motions were submitted by respective counsel on written briefs (R. 62). The court granted these motions (Pet. App. i), finding no "exceptional circumstances" to take these cases out of the statutory prohibition (*Id.* iv). The court noted that taxpayers' remedy "is to pay the taxes, apply for refund, and if refund is denied, sue the Director to recover the taxes" (*Id.* ii-vi). On appeal, the Court of Appeals for the Fifth Circuit affirmed *per curiam* (*Id.* vii).

ARGUMENT

This case presents no question calling for review by this Court. There is no conflict of decisions and none has been asserted. The decision of the court of appeals affirming dismissal of the complaints by the district court is correct.

Section 3653(a) of the Internal Revenue Code of 1939 provides, with exceptions not here material, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Contrary to petitioners' contention (Pet. 6-9), the Director does not contend that the statutory bar is absolute, for this Court "has repeatedly indicated that extraordinary and exceptional circumstances render its provisions inapplicable." *Miller* v. *Standard Nut Margarine Co.*, 284 U.S. 498, 509-510; *Hill* v. *Wallace*, 259 U.S. 44, 62. The district court dismissed the complaint because petitioners have not alleged facts sufficient to bring the case within the scope of the district court's equitable jurisdiction.[1]

Petitioners allege (R. 9, 22) that they are unable to pay the tax demanded, but the district court considered it plain from the pleadings that what was meant was that payment of the tax would be a hardship (Pet. App. iv). It does not appear that the operation of two pinball machines by

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[1] Taxpayers complain (Pet. 9) that they were not allowed to offer their proof. But their rights were fully protected by the rule that, on motions to dismiss for lack of jurisdiction, all the facts alleged by the plaintiff are taken as true. *Land* v. *Dollar*, 330 U.S. 731, 735, fn. 4; *Polk Co.* v. *Glover*, 305 U.S. 5, 9; Rule 12(b), Federal Rules of Civil Procedure.

either petitioner is a necessary adjunct of the operation of his business (R. 2, 14), nor are the taxes and penalties sought to be collected in either case large.[2] A bare allegation of hardship is clearly insufficient to confer jurisdiction on the district court. "Mere inconvenience to the taxpayer in raising the money with which to pay taxes is not uncommon, and is not a special circumstance which entitles one to resort to a suit for an injunction in order to test the validity or applicability of the tax." *California* v. *Latimer*, 305 U.S. 255, 262.

Petitioners' allegation (R. 10, 23) that the Director's action will lead to a multiplicity of suits is also without merit. The district court disposed of this contention with the observation that a single suit by each taxpayer is all that will be required to determine the question of the stamp tax properly due (Pet. App. v). Taxpayers' other allegations are mere conclusions.[3]

Petitioners have an adequate and complete rem-

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[2] Robique has two pinball machines located at "The Tesh Club" on which the taxes claimed for the period in question total $750 plus penalties of $137.50, and Kapsos has one each at "The Dixie Doodle Drive Inn" and "The Dixie Doodle Too" on which the taxes claimed total $708.34 plus penalties of $177.09 (R. 30, 52).

[3] The penalties herein (R. 30, 53) are not criminal as was the case in *Lipke* v. *Lederer*, 259 U.S. 557, and *Regal Drug Co.* v. *Wardell*, 260 U.S. 386, involving the National Prohibition Act, 41 Stat. 305, which petitioners cite, but are incidents of the tax itself provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the additional expenses incurred in the collection thereof resulting from taxpayers' failure to pay the tax when due. *Helvering* v. *Mitchell*, 303 U.S. 391, 401-405.

edy at law. Section 3653 is merely the statutory enactment of the rule long followed by courts of equity (See *State Railroad Tax Cases,* 92 U.S. 575, 613-614), that suits will not lie to restrain the collection of a tax upon the sole ground of its illegality, and does not foreclose suits upon grounds adequate to invoke the equitable jurisdiction of the courts. *Miller* v. *Standard Nut Margarine Co.,* 284 U.S. 498, 509. No question as to the constitutionality of Section 3653 therefore arises. *Pullan* v. *Kinsinger,* 20 Fed. Cas. No. 11,463; *Steinhagen Rice Milling Co.* v. *Scofield,* 87 F. 2d 804, 806 (C. A. 5).

"Any departure from the principle of 'pay first and litigate later' threatens an essential safeguard to the orderly functioning of government." *Allen* v. *Regents,* 304 U.S. 439, 456. Although exceptions to the rule may arise in extraordinary and exceptional circumstances, no such circumstances are alleged in the complaints which were properly dismissed below.

CONCLUSION

The decision of the court of appeals is correct and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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DENIED